LEE BUCK GEE

v.

LIEW KWEK KEONG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAACOB J
[CIVIL SUIT NO. C24-6476-86]
16 JUNE 1988

CIVIL PROCEDURE: *Summary judgment - Conditional leave allowed - Appeal - Misrepresentation alleged - Conduct of defendants blameworthy - Admission of debt - Plea of breach and/or variation by plaintiff stated - No particulars nor submission - Inadequacy of pleadings.*

This is an appeal against the SAR's order giving the defendants leave to defend conditional upon them depositing the sums claimed into Court. The 2nd and 3rd defendant were indemnifiers under an agreement of sale dated 26 March 1986 in which plaintiff sold shares in a company called Base Contacts Development Sdn. Bhd. to the 1st defendant. Pursuant to Clause 7 of the said agreement and in consideration of shares being registered in the 1st defendant's name and 1st defendant being appointed as director of Base Contacts, the 2nd and 3rd defendants agreed to pay RM1,000 a day as agreed liquidated damages in event of 1st defendant failing to fulfil his obligations. The balance of the sum payable was to be made on/before 16 April 1986. The 4th defendant, a firm of solicitors gave an undertaking that should 1st defendant fail to settle balance, plaintiff shall be at liberty to commence action against it. The plaintiff had proceeded against them and applied for summary judgment.

Held:

[1] Misrepresentation alleged by the 1st defendant was based on the non-disclosure of a valuation report of a piece of property owned by Base Contacts upon which the special price on the shares offered was based. The date of the valuation report ie 11 December 1984 alone should have prompted the defendants to enquire the true value of the property at 26 March 1986 when the agreement was executed.

[2] If defendants were diligent, they would have discovered the existence of the later valuation report which was used to obtain the loan from Public Finance Berhad. Therefore, defendants cannot blame their own failure to act as prudent businessman to evade their obligations.

[3] The plea that plaintiff had breached the agreement when he compromised and/or varied the agreement by allowing the 1st defendant to delay payment was stated but no particulars nor submission made.

[4] The pleadings in particular the statement of defence was inadequate as lacking in particulars. Nonetheless, defendants should not be shut out from defending by the mere inadequacy. The SAR's order was appropriate.

[Appeal dismissed with costs. Amounts claimed to be deposited within a month of the order.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendants/appellants - SA Ponmugam; M/s. Ponmugam & Co.
For the plaintiff/respondents - Thiagarajah; M/s. Hamzah Abu Samah & Partners

JUDGMENT

Siti Norma Yaacob J:

The claims by the plaintiff against all 4 defendants arise from the sale of the plaintiff's 148,464 shares in a company called Base Contacts Development Sdn. Bhd. (Base Contacts) to the 1st defendant for the agreed sum of RM282,081.60.

Under the agreement of sale dated 26 March 1986, the 2nd and 3rd defendants are described as indemnifiers, having agreed to guarantee payment of the purchase price and indemnify the plaintiff from any loss occasioned by the 1st defendant's breach of any term in the agreement. In addition, pursuant to Clause 7 of the agreement, and in consideration of the shares being registered in the 1st defendant's name and the 1st defendant appointed a director of Base Contacts, the 2nd and 3rd defendants have also agreed to pay the plaintiff RM1,000 a day as agreed liquidated damages should the 1st defendant fail to fulfill his obligations to secure the release of the plaintiff of his obligations as a guarantor in respect of 2 guarantees, executed by the plaintiff with Public Finance Bhd. and Malayan Banking Bhd., being securities for loans granted by the 2 financial institutions to Base Contacts.

Under Clause 2 of the agreement, part of the purchase price for the shares amounting to RM107,140 was paid by the 1st defendant to the plaintiff's solicitors on the day the agreement was executed on 26 March 1986, with the balance of RM174,941.60 to be settled not later than 21 days after that date i.e. on or before 16 April 1986.

On the same day the agreement was executed, the 4th defendant, a firm of solicitors, who were acting for the 1st defendant in the transaction, gave a written unconditional undertaking that should the 1st defendant fail to settle the balance of the purchase price on or before 14 April 1986, the plaintiff shall be at liberty to commence legal proceedings against it to recover any sum due from the 1st defendant.

Despite the shares being registered in the 1st defendant's name and he was duly appointed a director of Base Contacts, the 1st defendant had not only failed to fulfill his obligation to release the plaintiff from his obligations as a guarantor to Base Contacts but had also failed to settle the balance of the purchase price in full on the due date. He only managed to make part payment to the extent of RM85,715.62, leaving a balance of RM89,225.98, still due and owing and it is this sum that the present action is founded as against the 1st defendant, but as against the 2nd and 3rd defendants apart from their liability under the indemnity, there is also an additional claim for the liquidated damages under Clause 7 of the agreement and as against the 4th defendant, the claim is on the written unconditional undertaking that it had given.

Following the filing of separate statements of defence by all 4 defendants, the plaintiff applied for summary judgment under O. 14, but the Senior Assistant Registrar allowed the defendants leave to defend conditional upon their depositing the amounts claimed into Court within a month of the order granted. Dissatisfied, the defendants appealed to me.

The main thrust of the 1st defendant's defence is that the plaintiff had misrepresented that the shares were sold at a special price when in fact they were not. How the misrepresentation was practised is not disclosed as no particulars are given in the statement of defence. However, in an affidavit opposing the O. 14 application, it becomes clear that the misrepresentation alluded to, is the plaintiff's non-disclosure of a valuation report of the only piece of property owned by Base Contacts upon which the special price offered for the sale of the shares was based.

Under Clause 1 of the agreement, the purchase price of the shares was agreed at the special price of RM1.90 per share. On the pleadings, it is not clear on what considerations the special price was agreed upon. It is however the 1st defendant's contention that it was agreed on the value of the only asset Base Contacts has. To that end the plaintiff had disclosed a valuation report, dated 11 December 1984, wherein the land was certified to be worth RM23.8 million. However, unknown to the 1st defendant, the plaintiff was also in possession of another valuation report dated 8 November 1985, wherein the same piece of property was valued at RM9.35 million and it is on this non-disclosure of the second valuation report that the allegation of misrepresentation is founded.

The agreement was signed on 26 March 1986 and if indeed the market value of the land was the paramount factor that decided the special price, then it was all the more incumbent upon all the defendants, as prudent businessmen, to ascertain the true value of the property at the time the agreement was executed. The first valuation report is dated 11 December 1984, and this date alone should have prompted the defendants to enquire as to the true value of the property as at 26 March 1986, when the agreement was executed. The fact that they did not, lends support to the plaintiff's contention that the market value of the property had no substantial bearing as to the determination of the special price offered for the shares.

It is not disputed that the second valuation was prepared specially for Public Finance Berhad, to enable it to provide credit facilities to Base Contacts and in all probability that report has been accepted by the finance company, for it had awarded a loan to Base Contacts as is expressly declared in preamble D, para. (b)(i) of the agreement. That being so, the defendants should have been put on their guard and had they made further searches and inquiries, they would, by their diligence, have stumbled upon the existence of the second valuation report. On that conclusion, it is clear that the so-called misrepresentation is nothing more than the conduct of the defendants in failing to act as prudent businessmen and they cannot now blame their own failure to take care, to wriggle out of their obligations under the agreement.

There is also the undisputed evidence that the 3rd defendant had issued a cheque dated 22 September 1986 for RM138,204 in favour of the plaintiff's solicitors. Although the amount stated in the cheque does not tally with the principal sum claimed and from the covering letter dated 18 September 1986, it is clear that the cheque was made in payment of the final sum due under the agreement and reading the letter in its entirety, it is very clear that there was an admission of a debt due under the agreement and that the 3rd defendant had asked for time to settle the amount. However, the cheque was dishonoured when it was presented for payment.

The 2nd, 3rd and 4th defendant's line of defence is that the plaintiff had breached the agreement when he compromised and/or varied the agreement by allowing the 1st defendant to delay payment. However, apart from stating this plea, no particulars were given nor any submission made to support this contention but they had however raised other matters which I consider are of no relevance to the issues at hand.

On the pleadings, particularly the statement of defence of the 1st defendant, the issue of misrepresentation had been relied upon by all the defendants and although the statement of defence is lacking in particulars, this can easily be remedied by amendments. Bearing in mind that the defendants should not be altogether shut out from defending their own case by the mere inadequancy of their pleadings, I had considered that the Senior Assistant Registrar's order giving the defendants leave to defend conditional upon their depositing the sums

claimed into Court, as being a fair and appropriate order to make on the facts of this case. On that finding, I had accordingly dismissed the defendants' appeal with costs and directed them to deposit the amounts claimed within a month of the order.

Also found at [1988] 2 CLJ 617